IN THE HIGH COURT OF BOMBAY AT GOA
****

LETTERS PATENT APPEAL NO. 5 OF 2004

Union of India, Ministry
of Labour, through the
Welfare Commissioner,
Labour Welfare Organisation,
C60, Complex (Block 'C'),
Seminary Hills, Nagpur (M.S.). ... Appellant.

Versus

1. The Presiding Officer,
Central Government
Industrial Tribunal,
No.2, Mumbai (M.S.), and

2. Shri Newton Mazarello,
r/o Velim, Olizaino,
Salcete, Goa. ... Respondents.

Mr. E. P. Badrinarayana, Advocate for the appellant.

Mr. V. Menezes, advocate for respondent no.2.

CORAM : B. H. MARLAPALLE &
N. A. BRITTO, JJ.

DATE : 25th October, 2004.
1st November, 2004.

ORAL JUDGMENT (Per Marlapalle, J.)

Heard. Admit. With consent of the parties taken up for final hearing.

2. This Letters Patent Appeal arising from the Judgment of this Court (Single Bench) in Writ Petition no.153/99 raises an important question of law for our consideration, namely:

> "Whether the termination of service of a Central Government employee by invoking the powers under the applicable service rules framed under Article 309 of the Constitution is required to be examined on

> the touch-stone of Articles 311, 14 and 16 of the Constitution of India, or, on the ground of failure to comply with the provisions of Section 25 F of the Industrial Disputes Act, 1947?"

Writ Petition No.153/99 was filed under Articles 226 and 227 of the Constitution challenging the Award passed by the Central Government Industrial Tribunal II on 18th June, 1998 in Reference No.CGIT-2/39/1986 and by the said Order the present respondent no.2/employee was directed to be reinstated with continuity in service and with full back wages from the date of termination, i.e. 15th October, 1980 and the order of termination dated 15th October, 1980 was held to be not justified. The said Award came to be confirmed by the learned Single Judge and, therefore, it is an intra-Court appeal for correction of the said Order dated 6th February, 2004.

3. The respondent no.2/employee came to be appointed in the temporary post of Laboratory Technician in the office of the Vice Chairman of the Iron Ore Mines Labour Welfare Fund Advisory Committee for Goa, Daman and Diu by Memorandum dated 12th March, 1974, and by the further Order dated 25th April, 1974, issued by the Vice Chairman of the Iron Ore Mines Labour Welfare Fund Organization at Goa, he came to be appointed as temporary Laboratory Technician in the Central Hospital, Tiska, Darbandora, under the office of the Vice Chairman of the said organization/committee in the pay scale of Rs.130 - 300. The post of Laboratory

Technician is a permanent post, but the employee was appointed on temporary basis. After about six years his services came to be terminated by the Order dated 15th October, 1980, passed by the Welfare Commissioner by invoking his powers under Rule 5(1) of the Central Services (Temporary Service) Rules, 1965 (hereinafter referred to as "the Rules", for short). The said termination Order came to be challenged in Writ Petition No.111/82 and the said petition was disposed as withdrawn after it was amended. The employee thereafter submitted a representation dated 3rd September, 1984, and raised an industrial dispute before the Assistant Labour Commissioner (Central), Vasco da Gama, alleging that the Welfare Commissioner - Iron and Manganese Ore Welfare Organization, Panaji, had illegally terminated his services with effect from 15th October, 1980. The Conciliation Officer submitted his failure report dated 1st August, 1985, to the Secretary, Ministry of Labour, Government of India and a reference under Section 10(1) of the Industrial Disputes Act for adjudication came to be made by the Labour Ministry. The issue referred for adjudication read thus:-

> "Whether the action of the management of Welfare Commissioner, Iron & Manganese Ore Welfare Organization, Panaji, in respect of Central Hospital, Tiska in terminating the services of Shri Newton Mazarelo Laboratory Technician with effect from 15.10.1980 is justified? If not, to what relief the workman is entitled?"

Before the Tribunal, the reference came to be registered as Reference No. CGIT-2/39/86 and on consideration of the respective averments as well as the evidence before it, the Tribunal by its Award dated 18th June, 1998, allowed the reference and passed an order as referred to hereinabove directing reinstatement with full back wages and continuity in service.

4. The initial memorandum of appointment dated 12th March, 1974 had set out the terms of appointment and some of the relevant terms are reproduced as under:-

> (i) the post is temporary, but is likely to become permanent. In the event of its becoming permanent his/her claims for permanent absorption will be considered in accordance with the rules in force.
>
> (iii) the appointment may be terminated at any time by month's notice given by either side, viz. the appointee or appointing authority, without assigning any reason. The appointing authority however, reserves their right of terminating the services of the appointee forthwith or before the expiration of the stipulated period of notice by making payment to him of a sum equivalent of the unexpired portion thereof.

The termination Order dated 15th October, 1980, issued by the Welfare Commissioner read as under:-

> " BHARAT SARKAR/GOVT. OF INDIA SHRAM MANTRALAYA/MINISTRY OF LABOUR OFFICE OF THE WELFARE COMMISSIONER IRON ORE MINES LABOUR WELFARE FUND ORGANIZATION RUA ST. TOME, SALDHANA BUILDING, PANJIM, GOA

No.CH/16/PF-40 Dt.15.10.80

ORDER

In pursuance of the proviso to sub rule (1) of Rule 5 of the Central Services (Temporary Service) Rules, 1965, I hereby terminate forthwith the services of Shri Newton Mazarelo, Lab. Technician and direct that he shall be entitled to claim pay plus allowances for the period of notice at the same rates at which he was drawing them immediately before the termination of his service, or, as the case may be, for the period by which such notice falls/short of the month.

Sd/- (S. A. Rahim)
Welfare Commissioner

To

Shri Newton Mazarelo,
Lab. Technician,
Central Hospital,
Tiska, Goa.

Copy to

1. The Medical Officer in Charge,
Central Hospital, Tiska Goa.

2. Personal File.

3. Office copy."

5. In his representation dated 3rd September, 1984, submitted to the Assistant Labour Commissioner (Central), the employee had challenged the termination order as abrupt and only to appoint one Ms. Rozama K. George in his place and he claimed that against a permanent post he was appointed on temporary basis. However, during the course of conciliation proceedings on 28th November, 1994, he, for the first time, took the plea that the termination of his services was not in compliance with the conditions

precedent set out under Section 25 F of the Industrial Disputes Act, 1947 ("I.D. Act" for short) and, therefore, the said termination order was void and illegal. The employer organization opposed this contention on two grounds, namely:-

> " (a) it was not an "industry" as defined under Section 2(j) of the Industrial Disputes Act; and
>
> (b) when the termination order was issued under Rule 5(1) of the Rules, compliance with the requirements of Section 25 F of the Industrial Disputes Act, was not required to be made by the employer."

6. In his statement of claim dated 26th August, 1996 (Exh.1) before the Tribunal, it was claimed that the order of termination dated 15th October, 1980, amounted to retrenchment within the meaning of Section 2(oo) and the mandatory conditions precedent as set out under Section 25 F of the I.D. Act, were not complied with and, therefore, the termination was illegal and void ab initio. The department filed its written statement under the signature of the Welfare Commissioner on 3rd February, 1987 (Exh.6). In para 6 of the said written statement it set out in detail the unsatisfactory service record of the employee right from 1977, in para 8 it set out the instances of dereliction of duty by the employee and in para 9 the reasons for issuance of the termination order as well as non-applicability of the provisions of Section 25 F of the I.D. Act. We deem it appropriate to reproduce the averments in para 9 of the

written statement (Exh.I) submitted before the Tribunal as under:-

> 9. The record of preference by Shri Newton Mazarelo, being as narrated above, his incompatible temperament with the other staff, his habit of meddling with other people affairs, his failure to think and act clearly, the adverse remarks for the past 3 years and above all his professional dishonesty in rendering bogus investigation reports, without carrying out the necessary investigation, compelled the Welfare Commissioner to take stern action against him. As the very lives of the patients were in danger and the reputation of the Organization was at stake, the services of Shri Newton Mazarelo, Lb. Technician, who was a purely temporary employee, had to be terminated with immediate effect on 15.10.1980, under Rule 5(1) of the Central Civil Services (Temporary Service) Rules, 1965, by paying him a month's salary in advance in lieu of one month's notice. The Welfare Commissioner submits that he was within hi rights to terminate the services of the employee, Shri Newton Mazarelo, who was a temporary employee, under Rule 5(1) of the said Rules, it is therefore, submitted that the termination of the services of the employee, Shri Newton Mazarelo, is fully justified and is in order. If an inquiry was to be held in the charges levelled against him, there would have been a time lag, not to speak of the public scandal and the harm which would have been caused to the reputation of the Hospital. The case of Shri Newton Mazarelo was a typical case of the Employer losing confidence in the employee whose continuance in service even for a brief period for holding an inquiry under the service rules was neither possible nor advisable in view of the dangerous consequences which would have possibly ensued in treating the patients. Considering his deliberate acts of submitting bogus investigation reports and of not entering MRD Nos.on the reports giving rise to possibilities of wrong reports being connected to the case papers of the patients resulting in complications

> and fatalities of patients. In view of this, the employer submits that the action taken to terminate the services of Shri Newton Mazarelo with immediate effect under Rule 5(1) of Central Civil Services (Temporary Service) Rules, 1965, was not only warranted but was the only course open to the Employer in the circumstances. The Employer seeks to rely on the various rulings of the High Courts and the Supreme Court which have upheld such action taken by the Employer for loss of confidence in the employee and have held that such termination does not violate Section 25 F of the Industrial Disputes Act, 1947, which enacts a safeguard against wrongful retrenchment. In the circumstances, the Employer submits that the Employer was not under a legal obligation to pay retrenchment compensation to the applicant while terminating his services under Rule 5(1) of the said Central Civil Services (Temporary Service) Rules, 1965."

7. In support of his case the employee had submitted affidavit by way of examination-in-chief and he was cross-examined by the Department. On behalf of the Department, two witnesses, namely Mr. Aziz Ahmed, s/o Abdul Halin, Welfare Administrator and Mr. A. Siddeshi, Assistant Welfare Commissioner, were examined. It was contended that the Iron Ore Mines Manganese Ore Mines and Chrome Ore Mines Labour Welfare Fund came to be constituted under the Iron Ore Mines and Chrome Ore Mines Labour Welfare Fund Act, 1976 by the Government of India, by invoking its rule-making powers under Section 14 and the Government of India has framed the Iron Ore Mines Manganese Ore Mines and Chrome Ore Mines Labour Welfare Fund Rules, 1978. Rule 18 therein states that persons appointed under Section 8 shall be governed by such rules relating to the terms and

conditions of service as are applicable to Central Government Service. Section 8(2) of the Iron Ore Mines Act states that the Central Government may, by general or special order, direct a Welfare Commissioner to appoint such staff as is considered necessary for the purpose of the Act and the Iron Ore Mines Manganese Ore Mines and Labour Welfare Cess Act, 1976. As per Section 8(3) of the Act every person so appointed shall be deemed to be a "public servant" within the meaning of Section 21 of the Indian Penal Code. There is no dispute that the welfare Commissioner was the appointing authority for the employee, the employee was a servant of the Central Government and his service conditions were governed by the Central Civil Services (Temporary Services) Rules, 1965. Rule 5 of the said Rules reads as under:-

> "5. **Termination of temporary service. -**
>
> (1)(a) The services of a temporary Government Servant shall be liable to termination at any time by a notice in writing given either by the Government Servant to the appointing authority or by the appointing authority to the Government Servant;
>
> (b) the period of such notice shall be one month:
>
> Provided that the services of any such Government Servant may be terminated forthwith by payment to him of a sum equivalent to the amount of his pay plus allowances for the period of the notice at the same rates at which he was drawing them immediately before the termination of his services, or, as the case may be, for the period by which such notice falls short of

one month.

Note:- The following procedure shall be adopted by the appointing authority while serving notice on such Government Servant under clause (a) -

(i) The notice shall be delivered or tendered to the Government Servant in person.

(ii) Where personal service is not practicable, the notice shall be served on such Government Servant by registered post acknowledgment due at the address of the Government Servant available with the Appointing Authority.

(iii) If the notice sent by registered post is returned unserved it shall be published in the Official Gazette and upon such publication, it shall be deemed to have been personally served on such Government Servant on the date it was published in the Official Gazette.

(2)(a) Where a notice is given by the appointing authority terminating the services of a temporary Government Servant, or where the services of any such Government Servant is terminated either on the expiry of the period of such notice or forthwith by payment of pay plus allowances, the Central Government or any other authority specified by the Central Government in this behalf may, of its own motion or otherwise, re-open the case, and after calling for the records of the case and after making such enquiry it deems fit-

(i) confirm the action taken by the appointing authority;

(ii) withdraw the notice;

(iii) reinstate the Government Servant in service; or

(iv) make such other order in the case as it may consider proper;

Provided that except in special circumstances, which should be recorded in writing, no case shall be reopened under this sub-rule after the expiry of three

months:

(i) from the date of notice, in a case where notice is given;

(ii) from the date of termination of service, in a case where no notice is given.

(b) Where a Government Servant is reinstated in service under sub-rule (2) the order of reinstatement shall specify;

(i) the amount of proportion of pay and allowances, if any, to be paid to the Government Servant for the period of his absence between the date of termination of his services and the date of his reinstatement; and

(ii) whether the said period shall be treated as a period spent on duty for any specified purpose or purposes."

Sub-rule (1) of Rule 5 sets out the procedure for termination of a temporary Government Servant, whereas Sub-rule (2) of the said Rule provides for the remedy of revision/appeal against the order of termination passed under Sub-rule (1). The Government of India O.M. No.39/14/56-ESTS (A) dated 22nd June, 1956, stipulated that when action is taken under Rule 5 to terminate the services of a temporary employee the order of termination which should be passed by the appointing authority, should not mention the reasons for such termination. Rule 5 was thereaftrer amended by amending the proviso with effect from 1st May, 1965. The Rules have been framed under Article 309 of the Constitution.

8. Though the Department had placed before the Tribunal, through its witnesses, the details of

unsatisfactory service record purportedly leading to loss of confidence and supporting the disciplinary authority's powers under Rule 5(1) of the Rules to terminate a temporary employee without assigning any reasons, the Tribunal held that the said termination amounted to retrenchment within the meaning of Section 2(oo) of the I.D. Act, the said termination was in contravention of the provisions of Section 25 F of the said Act and the termination was not justified. The primary issue regarding the jurisdiction of the Tribunal to entertain and adjudicate the reference was also answered against the Department. In paragraphs 16 and 17 of its Award, the Tribunal observed as under:-

> "16. Aziz Ahmed and A. Siddeshi tried to bring on record that there were series of complaints against the workman and they have produced necessary documents to substantiate their case alongwith Exhibits 7 and 14. It is admitted position that there was no departmental inquiry against the workman he had no opportunity to meet out those allegations. Siddeshi in categorical term admits the position that when the workman was terminated he was not paid retrenchment compensation. It can be seen from the record that he was given one month's notice but at the same time he was not paid the salary but later on was asked to collect it. Non payment of retrenchment compensation as contemplated under Section 25 F of the Industrial Disputes Act clearly goes to show that his termination is void.
>
> 17. The workman in his affidavit had taken different contentions in respect of interest of the management of appointing some lady and his harassment. All these matters have no merit to decide this case. As observed above as the workman is in continuous service from 1974 to 1980 and as his termination is without following the

provisions of Section 25 F of the Industrial Disputes Act of 1947 the action is to be declared void."

9. At this stage itself, we may deal with the alleged issue of non-payment of notice pay alongwith the termination Order dated 15th October, 1980. In the case of **Management of M.C.D. vs. Prem Chand Gupta & Anr.,** (AIR 2000 S.C.454), it has been held that consequent to the amendment of Rule 5 of the Rules with effect from 1st May, 1965, the failure to make the payment of notice pay/compensation, does not vitiate the termination Order as the payment of compensation simultaneously with the order of termination is not a condition precedent. The Supreme Court examined the applicability of Section 25 F of the I.D. Act eventhough the termination order was issued under Rule 5(1) of the Rules and noted that the provisions of Section 25 F got squarely attracted as the order of termination was not by way of punishment, by referring to its earlier decisions by a three Judge Bench in the case of **State Bank of India s. N. Sundara Money,** (AIR 1976 S.C. 1111) and Constitution Bench judgment in the case of **Punjab Land Development and Reclamation Corporation Ltd., Chandigarh vs. Presiding Officer, Labour Court, Chandigarh,** [(1990)3 SCC 682]. In all these cases the employer was either a corporation, company or undertaking owned by the Central Government or the State Government. Such is not the case at hand. The employee was the servant of the Government of India and not of any corporation or company owned by the State or Central

Government. Under such circumstances, while examining the challenge to the termination Order dated 15th October, 1980, on the grounds of its justifiability, the following three issues were required to be adjudicated upon:-

(a) whether the termination order was punitive or stigmatic and/or amounted to punishment;

(b) whether it was required to be preceded by a departmental enquiry regarding the unsatisfactory service record, dereliction in duty and loss of confidence, etc.; and

(c) whether the termination order was in breach of any of the service rules or guarantee provided under Article 311 read with Articles 14 and 16 of the Constitution.

10. The Tribunal did not do so and in fact, it appears to have been overwhelmed by the contentions of the employee that his termination amounted to retrenchment and as there was failure to comply with Section 25 F of the I.D. Act, the termination order was illegal. This approach of the Tribunal was manifestly erroneous. The term "retrenchment" has been defined under Section 2(oo) of the Industrial Disputes Act and it means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way

of disciplinary action, but does not include –

(a) voluntary retirement of the workman; or

(b) retirement of the workman on reaching the age of superannuation if the contract employment between the employer and the workman concerned contains a stipulation in that behalf, or

(bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or

(c) termination of the service of a workman on the ground of continued ill-health.

On the face of the pleadings raised by the department in its written statement before the Tribunal (Exh.6) admittedly, clauses (a) to (c) of Section 2(oo) of the Industrial Disputes Act, were not attracted. However, it was necessary for the Tribunal to record a finding that the termination Order impugned did not amount to a punishment or loss of confidence or was not based on unsatisfactory performance. In the case of **Chandu Lal vs. The Management of M/s. Pan American World Airways Inc.,** (AIR

1985 S.C.1128), and **Komal Kishore Lakshman vs. Management of M/s. Pan American World Airways Inc. & Ors.,** (AIR 1987 S.C. 229), it has been held that the termination of service by the employer by way of inflicting punishment for misconduct on the ground of loss of confidence, does not amount to retrenchment within the meaning of Section 2(oo) of the I.D. Act. We need not add to the list of enunciations in this regard, in view of the settled legal position.

11. A similar order of termination had come up for consideration before a three Judge Bench in the case of **Air-India Corporation, Bombay vs. V. A. Revellow & Anr.,** [(1972) 1 SCC 814]. One of the two issues decided was whether the termination of service was a dismissal as alleged or was a mere termination of service not amounting to dismissal. The termination Order dated 19th June, 1965, read as under:-

> "Dear Sir,
>
> It has been decided to terminate your services, which we hereby do with immediate effect. You will be paid one month's salary in lieu of notice.
>
> 2. Please arrange to return, as early as possible, all items of Corporation's property in your possession to enable us to settle your accounts.
>
> 3. Your accounts will be settled after checking your commitments.
>
> Yours faithfully,
> AIR INDIA

(Sd.) S. K. Kooka
Commercial Director."

The termination order was issued by invoking powers under Regulation 48 of the Air India Employees' Service Regulations and the provisions of the said Regulations are akin to the scheme of Rule 5(1) of the Rules. Regulation 48 states that the service of an employee may be terminated without assigning any reason, as under:

(a) of a permanent employee by giving him 30 days' notice in writing or pay in lieu of notice;

(b) of an employee on probation by giving him 7 days' notice in writing or pay in lieu of notice; and (c) of a temporary employee by giving him 24 hours' notice in writing or pay in lieu of notice.

In the reply filed before the adjudicator, the employer set out in detail the reasons for issuing the termination order under Regulation no.48, in the following words:-

> "However, without prejudice to this, the Opposite Party says that the Complainant's service was terminated because of the total loss of confidence on account of grave suspicions regarding his private conduct and behaviour with Air Hostesses of the Corporation. The reports and statements from the Air Hostesses concerned cannot be disclosed as they involve the reputation and future of young and unmarried girls. Having regard to this, the Opposite Party could not

> continue the Complainant in its service and it was constrained to terminate his service in accordance with Regulation 48."

On reading the termination Order the Supreme Court held that on its face the language did not show that the complainant's services were terminated because of any misconduct and prima facie, therefore, the impugned Order was not an order of discharging or punishing him for any misconduct. It further held that no doubt the position of the industrial workmen is different from that of a Government Servant because an industrial employer cannot hire and fire the workmen based on an unfettered right under the contract of employment, that right being subject to industrial adjudication and there is also, on the other hand, no provision of the Constitution like Articles nos.310 and 311 requiring consideration in the case of industrial workmen. Regarding the interpretations of Regulation no.48, the Court in para 16 noted thus:-

> "16. Regulation 48 which has been set out earlier as its plain language shows does not lay down or contemplate any defined essential pre-requisite for invoking its operation. Action under this Regulation can be validly taken by the employer at his sweet will without assigning any reason. He is not bound to disclose why he does not want to continue in service the employee concerned. It may be conceded that an employer must always have some reason for terminating the service of his employee. Such reasons apart from misconduct may, inter alia, be want of full satisfaction with his overall suitability in the job assigned to the employee concerned. The fact that the employer is not fully satisfied with the overall result of the performance of his duties by his employee

> does not necessarily imply misconduct on his part. The only thing that remains to be seen is if in this case the impugned is mala fide. The record merely discloses that the appellant had suspicion about the complainant's suitability for the job in which he was employed and this led to loss of confidence in him with the result that his services were terminated under Regulation 48. In our view, loss of confidence in such circumstances cannot be considered to be mala fide. We are unable to conceive of any rational challenge to the bona fides of the employer in making the impugned order in the above background. The complainant, it may be remembered had to deal with Air Hostesses in the performance of his duties and if the appellant was not fully satisfied beyond suspicion about his general conduct and behaviour while dealing with them it cannot be said that loss of confidence was not bona fide. Once bona fide loss of confidence is affirmed the impugned order must be considered to be immune from challenge. The opinion formed by the employer about the suitability of his employee for the job assigned to him even though erroneous, if bona fide, is in our opinion final and not subject to review by the industrial adjudication. Such opinion may legitimately induce the employer to terminate the employee's service; but such termination can on no rational grounds be considered to be for misconduct and must, therefore, be held to be permissible and immune from challenge."

12. In the case of **Parshotam Lal Dhingra vs. Union of India,** [(1958) SCR 828], it was held that any and every termination of service is not a dismissal, removal or reduction in rank and a termination of service brought about by the exercise of a contractual right is not, per se, dismissal, or removal as has been held in the case of **Satish Chander Anand vs. Union of India,** [(1953)SCR 655]. The Supreme Court further went on to observe in the said case as under:-

> " The use of the expression 'terminate' or'discharge' is not conclusive. Inspite of the use of such innocuous expressions, the court has to apply the two tests mentioned above, namely, (a) whether the servant had a right to the post or the rank; or (2) whether he has been visited with evil consequences of the kind hereinbefore referred to? If the case satisfies either of the two tests then it must be held that the servant has been punished and the termination of his service must be taken as a dismissal or removal from service or the reversion to his substantive rank must be regarded as a reduction in rank and if the requirements of the rules and Art.311, which give protection to Government servant have not been complied with, the termination of the service or the reduction in rank must be held to be wrongful and in violation of the constitutional right of the servant".

In **Radhey Shyam Gupta vs. U.P. State Agro Industries Corporation Ltd. & Anr.,** [JT 1998 (8) S.C. 585], the test of "motive" and "foundation" behind an order of termination were examined and it was stated thus:-

> "In fact, the employer, by opting to pass a simple order of termination as permitted by the terms of appointment or as permitted by the rules so conferring a benefit on the employee by passing a simple order of termination so that the employee would not suffer from any stigma which would attach to the rest of his career if a dismissal or other punitive order was passed."

In **State of Punjab & Ors. Balbir Singh,** [JT 2004 (7) S.C. 383], the Supreme Court summarized the law on termination, dismissal, termination simpliciter and discharge, etc. and summarized the legal position in the

following words:-

> "Thus the principle that in order to determine whether the misconduct is motive or foundation of order of termination, the test to be applied is to ask the question as to what was the 'object of the enquiry'. If an enquiry or an assessment is done with the object of finding out any misconduct on the part of the employee and for that reason his services are terminated, then it would be punitive in nature. On the other hand, if such an enquiry or an assessment is aimed at determining the suitability of an employee for a particular job, such termination would be termination simplictor and not punitive in nature."

13. In the case at hand, the language of the termination order dated 15th October, 1980 is not ambiguous, does not carry any stigma, nor does it indicate that it was founded on a charge of misconduct. The order was plain and simple, based on the powers provided under Rule 5(1) of the Rules. Admittedly, the employee filed an appeal/revision under Rule 5(2) of the Rules and the same was turned down as per Order dated 12th October, 1981. The employer set out the reasons for termination in its written statement for the first time as the employee challenged the order of termination stating that it was not an order of punishment, nor was it stigma and it amounted to discharge simpliciter and thus retrenchment within the meaning of Section 2(oo) of the Industrial Disputes Act. To repel these contentions the employer set out the details regarding the service record, the instances of dereliction of duty, the adverse confidential reports for three years and other acts leading

to loss of confidence in the employee. The employee had denied and disputed the instances set out in paragraphs 6 and 7 of the written statement. It was, therefore, imperative for the Industrial Tribunal to first decide the issue whether the order of termination dated 15th October, 1980, was a punitive order or an order of discharge simpliciter. If the Tribunal had come to the conclusion that it was a punitive order, it was necessary for the Tribunal to call upon the employer to place on record the oral and documentary evidence which in turn could have been countered by the employee, so that the Tribunal could have arrived at a conclusion whether the punishment of dismissal was warranted. If the order of termination is not by way of punishment and if the employer is able to prove its case regarding loss of confidence, even then the termination order would not be within the ambit of the terms "retrenchment". On the face of the plea taken by the employer elaborately in its written statement, it was not permissible for the Tribunal to consider the sole issue regarding retrenchment and non-compliance of Section 25 F of the I.D. Act. The employer impliedly relied upon Clause (b) of the second proviso to Article 311 (2) of the Constitution in its decision not to conduct an enquiry against the employee and it has been held in a catena of decisions that the employer may justify in a given set of facts that the order of dismissal or removal from service would be legal even in the absence of holding an enquiry

contemplated under Article 311(2). If the termination order smacks of any arbitrary act by the employer it would violate Article 16 eventhough the employee was ad-hoc or casual, as has been held in the case of **Kumari Shrilekha Vidyarthi & Ors. vs. State of U.P. & Ors.,** [1991 (1) SCC 212].

14. In the present case, granting leave to amend Writ Petition No.111/82 could not be termed as an approval of this Court for his contentions that the termination order dated 15th October, 1980 was required to be tested on the ground of failure to comply with the provisions of Section 25 F of the I. D. Act. The Reference Order dated llth/14th August, 1986, was also specific and it only implied to test the justifiability of the termination order, and the issue of justifiability was required to be examined on the basis of the service rules applicable.

15. The learned Single Judge in her Order which is sought to be corrected in this Appeal observed as under:-

> "There is no doubt that although the hospital which is being run for administering medical services to mine workers is established and run by the Central Government. However, this would not mean that the hospital itself is not an industry. If the hospital is an industry, the question of the Central Civil Service Rules being applicable does not arise. It is the Industrial Disputes Act which governs the relationship between the petitioner and the respondent. That being so, the respondent was entitled to notice wages and retrenchment compensation as a condition

> precedent to termination of services although he was a temporary workman."

This view does not appear to be in keeping with the well-established legal position insofar as the employees of the Central Government. The employees of the Central Government or the State Government, as the case may be, are governed by the service rules framed under Article 309 of the Constitution and it cannot be said that the Central Civil Service Rules would not apply and the relationship will be governed by the provisions of the I.D. Act. The observations made by the learned Single Judge may apply to the casuals/daily wagers or those employed on projects of the Central/State Governments, but not covered by any service rules framed under Article 309 of the Constitution. Section 13 B of the Industrial Employment (Standing Orders) Act,1946, states that nothing therein shall apply to an industrial establishment insofar as the workmen employed therein are persons to whom the Fundamental and Supplementary Rules, Civil Service (CCA) Rules, Civil Service (Temporary Service) Rules, etc. or any other rules or regulations as may be notified in this behalf by the appropriate Government in the Official Gazette.

In the case of **Pramod Jha & Ors. vs. State of Bihar & Ors.,** (AIR 2003 S.C. 1872), a large number of workers were engaged on daily wage basis in Government Departments and more particularly on specific projects/schemes. When they were found to be surplus

termination of their service was effected by complying with the provisions of Section 25 F of the I.D. Act. It is obvious that these daily wagers were not covered by any service rules framed under Article 309 of the Constitution.

In the case of **State of Uttar Pradesh & Anr. vs. Kaushal Kishore Shukla,** [(1991) 1 SCC 691], a three Judge Bench held:-

> "(1) In our opinion, the principle of 'last come first go' is applicable to a case where on account of reduction of work or shrinkage of cadre retrenchment takes place and the services of employees are terminated on account of retrenchment. In the event of retrenchment the principle of 'last come first go' is applicable under which senior in service is retained while the junior's services are terminated. But this principle is not applicable to a case where the services of a temporary employee are terminated on the assessment of his work and suitability in accordance with terms and conditions of his service.
>
> .....
>
> (2) Under the service jurisprudence a temporary Government employee has no right to hold the post and his services are liable to be terminated in accordance with the relevant service rules and the terms of contract of service. If on the perusal of the character roll entries or on the basis of preliminary enquiry on the allegations made against an employee, the competent authority is satisfied that the employee is not suitable for the service whereupon the services of the temporary employee are terminated, no exception can be taken to such an order of termination.....
> .....
> A temporary employee's services are liable to be terminated by giving one month's notice without assigning any reason either

under the terms of the contract providing for such termination, or under the relevant statutory rules regulating the terms and conditions of temporary Government servants; and

(3) A temporary Government servant can, however, be dismissed from service by way of punishment. Whenever, the competent authority is satisfied that the work and conduct of a temporary servant is not satisfactory or that his continuance in service is not in public interest on account of his unsuitability, misconduct or inefficiency, it may either terminate his services in accordance with the terms and conditions of the service or the relevant rules or it may decide to take punitive action against the temporary Government servant. If it decides to take punitive action it may hold a formal inquiry by framing charges and giving opportunity to the government servant in accordance with the provisions of Article 311 of the Constitution. Since, a temporary government servant is also entitled to the protection of Article 311(2) in the same manner as a permanent government servant, very often, the question arises whether an order of termination is in accordance with the contract of service and relevant rules regulating the temporary employment or it is by way of punishment. It is now well-settled that the form of the order is not conclusive and it is open to the court to determine the true nature of the order."

More recently, in the case of **Dhananjay vs. Chief Executive Office, Zilla Parishad, Jalna,** (AIR 2003 S.C.1175), the Supreme Court stated:-

"..... Since the respondent is only a temporary Government servant, the power being available under R.5(1) of the Rules, it is always open to the competent authority to invoke the said power and terminate the services of the employee instead of conducting the enquiry or to continue in service a Government servant accused of defalcation of public money. Reinstatement

> would be charter for him to indulge with impunity in misappropriation of public money."

In the case of **Mathew P. Thomas vs. Kerala State Civil Supply Corpn. Ltd. & Ors.,** [(2003)3 SCC 263], the Supreme Court stated:-

> "From a long line of decisions it appears to us that whether an order of termination is simpliciter or punitive has ultimately to be decided having due regard to the facts and circumstances of each case. many a times the distinction between the foundation and motive in relation to an order of termination either is thin or overlapping. It may be difficult either to categorize or classify strictly orders of termination simpliciter falling in one or the other category, based on misconduct as foundation for passing the order of termination simpliciter or on motive on the ground of unsuitability to continue in service."

16. Having regard to the above listed enunciations, we have no doubt in our mind that the reference made to the Tribunal in respect of the termination of services of the respondent/employee by invoking the powers under Rule 5(1) of the Rules, was required to be examined on the touch-stone of the service rules framed under Article 309 as well as Articles 14, 16 and 311 (2) of the Constitution of India and not on the purported ground of illegal retrenchment within the meaning of Section 2(oo) of the I.D. Act. It would be, therefore, necessary to remand the reference for fresh adjudication on the issues listed hereinabove and the adjudication has to be completed within a fixed period.

17. We have also noted that by Order dated 10th September, 2004, passed in Writ Petition No.153/1999, the respondent-employee was directed to be paid an amount of Rs.768/- (as last drawn wages as on 15th October, 1980) per month and the employee was directed to collect the same on any date between 1st and 7th of the month following which the salary was due. This arrangement admittedly continues even as at present.

18. In the result, we allow this Letters Patent Appeal and quash and set aside the impugned Award passed by the the Central Government Industrial Tribunal II of Mumbai, in Reference No. CGIT-2/39/1986.

The said Reference is hereby remanded for fresh adjudication on the issues framed hereinabove. Fresh adjudication shall be completed as expeditiously as possible and, in any case, within the period of six months from the date of first appearance. The parties to appear before the Tribunal on 29th November, 2004. The Order passed by this Court on 10th September, 2004 in Writ Petition No.153/1999 shall be operative till the reference on remand is decided.

N. A. BRITTO,J. B. H. MARLAPALLE, J.